

2015 WL 4130207 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

CITY OF GULFPORT, Mississippi, Appellant,
v.
LYMAN UTILITIES, INC., Appellee.

No. 2014-CA-00513-SCT.
March 24, 2015.

Appeal from the Special Court of Eminent Domain
Harrison County, Mississippi, First Judicial District

Reply Brief of Appellant

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***1 INTRODUCTION**

Lyman Utilities, Inc. (Lyman) admits that the legal analysis by the City of Gulfport (the City) concluding that interest on eminent domain judgements relating to privately owned public utilities should begin on the date the condemning entity takes actual possession of the utility as opposed to the date the action was filed. (Brief of Appellee, p. 3). Lyman contends that an Agreed Order entered on November 26, 2007, contractually binds the City to pay interest on the judgment in this cause from the date the complaint was filed rather than the date the City took actual possession of the utility. The City does not agree that the Agreed Order constitutes a contract but, for purposes of this reply brief, will address the issue as if the Agreed Order constituted a contract between the City and Lyman.

STATEMENT OF RELEVANT FACTS ON CONTRACTUAL ISSUES

The Agreed Order (CP pp. 209-10) resulted from a hearing on November 15, 2007. (The Court Reporter's transcript shall be referenced as "T"; the Clerk's Papers shall be referenced as "CP"; the Record Excerpts shall be referenced as "RE"; and the Trial Exhibits shall be referenced as "Ex.>"). At the time, the trial was scheduled for November 26, 2007. (CP p. 131). The hearing related, in part, to the City's Motion in *Limine* to exclude the testimony of Lyman's expert witness, Gerald Hartman, regarding the value of Lyman's Certificate of Convenience. (CP pp. 142-71). The trial court expressed "real problems" with the methodology used by Mr. Hartman. (T p. 9). The trial court subsequently did enter an order excluding the testimony of Mr. Hartman. (CP pp. 212-13). The trial court suggested the parties agree to a "voluntary quick take". (T p. 28). The trial court presumed the law required the utility to be valued as of 1996 (T p. 16), counsel for Lyman agreed (but did not like) the law required the utility to be valued as of 1996 (Id) and counsel for the City agreed the valuation date was 1996 (T p. 34). The parties did *2 agree to convert the case to a "quick take" proceeding. (T p. 33). The agreement was predicated on the belief of the trial court and the parties that the utility system would be valued as of "Whatever the date of taking is" and that the date of taking was the date the complaint was filed in 1996. (T p. 34). No one contemplated that the Lyman utility system would be valued as of the date the City actually took possession in December 2007.

During pre-trial discovery motions, an issue arose as to whether the date of taking and valuation was the date the eminent domain petition was filed or the date the City actually took possession. In reliance on *Dedeaux Utility Company, Inc. v. City of Gulfport*, 63 So.3d 514 (Miss. 2011) (*Dedeaux II*), the Trial Court ruled that the date of taking for this utility acquisition is the date the City actually took over the operations of the utility system, not the date the City filed the eminent domain petition. (CP pp. 230-232, RE pp. 14-16). The evidence presented reflected that assets were added to the utility system after the date the Complaint was filed. (Trial Ex. 4). Specifically, assets were added to the system in 1998 and 2002. (Trial Ex. 4). The City's value of the depreciable assets of the utility system increased from \$91,004.00 on the date of the filing of the Complaint (Trial Ex. 8) to \$62,759.00 (Trial Ex. 4) on the date the City took possession of the utility system. The total of the increase in the City's value of the depreciable assets from the date of filing the Complaint is \$71,755.00 (\$162,759.00 - \$91,004.00). The jury was instructed that the date for valuation of the utility system was December 12, 2007. (CP p. 293). The jury returned a verdict in favor of the Defendant for \$196,979.00. (CP p. 307).¹

Lyman asked the trial court, and is asking this Court, for specific enforcement of the portion of the Agreed Order relating to the payment of interest from the date of the filing of the complaint in this cause. The result of such specific enforcement is that the City would pay *3 interest on value that did not exist when the interest began accruing.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW.

It makes no difference if the issue in this appeal is whether the trial court erroneously applied the post *Dedeaux II* law regarding the date interest begins to accrue or whether the trial court misinterpreted the alleged contract (Agreed Order), "... questions of law, including questions of contract construction, are reviewed de novo." *Julvanna, LLC v. Economy Inns, Inc.*, 24 So.3d 391, 393 (Miss.Ct.App. 2009).

II. LYMAN IS NOT ENTITLED TO SPECIFIC ENFORCEMENT OF THE PROVISION IN THE AGREED ORDER THAT INTEREST WOULD BE PAID FROM THE DATE OF FILING THE COMPLAINT IN 1996.

A. THE AGREED ORDER WAS NOT INTENDED TO BE A FINAL JUDGMENT RESOLVING ALL LEGAL ISSUES BETWEEN THE PARTIES.

Lyman cited *Leman v. Mississippi Transportation Commission*, 127 So.3d 277 (Miss. Ct. App. 2013), as support for Lyman's contention that the Agreed Order entered November 26, 2007 constitutes a contract between the City and Lyman. There is a

key difference between the order entered in this cause and the ones entered in *Lehman* and the cases cited in *Lehman*. All of the “orders” considered in *Lehman* and the other cases were final judgments which concluded all issues in those cases and terminated each action. The Agreed Order entered in this cause was not intended to be a final judgment but was intended solely as a vehicle to convert this action to a “quick take” action based on what the Court and counsel for both parties understood to be the applicable law.

B. THE AGREED ORDER WAS BASED UPON THE CONTINUED *4 EXISTENCE OF AN ESSENTIAL CONDITION WHICH CEASED TO EXIST.

The Agreed Order was based upon the belief that the valuation date of a privately owned public utility would be valued, like all other condemned property, at the date the condemnation petition was filed. The parties did not contemplate that the Supreme Court in *Dedeaux II* would find that provision of the law unconstitutional. In *Gulf & S.I.R. Co. v. Horn*, 135 Miss. 804, 100 So. 381 (1924), the Court refused to enforce a contract wherein Horn was to be hired to assist the railroad's **elderly** claim agent. Prior to Horn coming to work, the **elderly** claim agent retired. The Court found that the continued employment of the **elderly** claim agent was an essential condition of the contract which, through no fault of the contracting parties, no longer existed, stating: There are, however, certain classes of events the occurring of which are said to excuse from performance because ‘they are not within the contract,’ for the reason that it cannot reasonably be supposed that either party would have so intended had they contemplated their occurrence when the contract was entered into, so that the promisor cannot be said to have accepted specifically nor promised unconditionally in respect to them.

Gulf & S.I.R. Co. v. Horn, 100 So. at 382.

The *Horn* case was followed in *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. B. C. Rogers and Sons, Inc.*, 696 F.2d 1113, 1115 (5th Cir. 1983), in which the standards for excusing a party's duty to perform were stated to be: “(1) the parties contracted on the basis of the continued existence of a specific state of things or condition that ceases to exist at the time for performance; (2) the promisor was not at fault; and (3) the promisor could not have anticipated the cessation of the crucial condition.” See also, *Miller v. Talton Telecommunications Corporation*, 907 F. Supp. 227 (S.D. Miss. 1995).

*5 The City submits that it cannot reasonably be supposed that the City would agree to pay interest from the date the lawsuit was filed had it contemplated that the utility system would be valued in a manner to include the value of assets which did not exist on that date. The City was not at fault in the change of the valuation date as the change was made by the Supreme Court. The City could not have reasonably anticipated the ruling of the Supreme Court. Accordingly, the City should not be bound to pay interest from the date of filing the complaint but instead should pay interest from the date it acquired the utility system, which is the date of valuation.

C. A MUTUAL MISTAKE OF FACT PRECLUDES THE SPECIFIC ENFORCEMENT OF THE AGREED ORDER.

Without question, the parties believed the Lyman utility system would be valued as of the date the action was filed, not the date the City acquired possession of the utility pursuant to the Agreed Order. This was a mutual mistake of fact, albeit the mistake of fact was the result of a misunderstanding of the law which would be applicable when the case was eventually tried. “For specific performance to be granted, a contract must be reasonably complete and reasonably definite on material terms.” *White v. Cooke*, 4 So.3d 330, 334 (Miss. 2009). “A contract may be set aside... where both parties at the time of the agreement were operating under a mutual mistake of fact.” *Id.* The date of valuation of the utility system was an essential term of the Agreed Order which not only affected the valuation but also affected the date interest would begin to run.

D. LYMAN BREACHED THE AGREEMENT PRECLUDING SPECIFIC ENFORCEMENT OF THE AGREED ORDER.

“Mississippi law prohibits an award of specific performance unless the party seeking that relief performs his or her part of the contract within the time allotted for his or her performance.” *Quarter Development, LLC v. Hollowell*, 96 So.3d 49,52 (Miss. Ct. App. 2012). A party cannot *6 obtain a decree for specific performance without he shows a compliance, or readiness to comply with his part of the contract.” *Gunn v. Heggins*, 964 So.2d 586, 590 (Miss. Ct. App. 2007). Lyman accepted, without protest, the ruling of the trial court that the Lyman utility system would be valued as of the date the City acquired possession of the system (2007) rather than the agreed upon date of the filing of the complaint (1996). Lyman obtained substantial monetary benefit from the change in the valuation date, thus breaching the Agreed Order. Lyman should not be granted the equitable remedy of specific enforcement of an agreement with which it did not comply.

CONCLUSION

The City and Lyman agreed to convert this action to a “quick take” proceeding because, otherwise, Lyman would have been forced to try the case in November 2007 without the benefit of its expert testimony concerning the value of Lyman's certificate of convenience. An Agreed Order was entered based upon the understanding of the parties and the trial court that the date of valuation would be the date the complaint was filed. When the case was tried, the trial court ruled, without objection by Lyman, that the date of valuation would be the date the City actually took possession of the utility system in December 2007. Lyman wants to accept the **financial** benefits from the change in valuation date while requiring the City to pay interest on assets and value which did not exist when the complaint was filed. An essential condition of the agreement between the parties, that is the system would be valued as of the date the complaint was filed, ceased to exist through no fault of the City. This action should be remanded to the trial court with instructions that the final judgment should reflect that interest on the jury verdict should begin to accrue on the date the City took actual possession of the utility system.

Footnotes

- 1 This paragraph is taken verbatim from Page 3 of the Brief of Appellant.